IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-400

LEON JONES, et al., individually and as representatives of their class,

Petitioners,

—v.—

PACIFIC INTERMOUNTAIN EXPRESS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____

LEON JONES, WILLIE DAVIS, DANNIE MILLAR, LONNIE E. WILLIS, SIM CALDWELL, JR., WALTER HENDERSON, SAUL JAMES, CHARLES PHILLIPS, individually and as representatives of their class,

Petitioners,

-v.-

PACIFIC INTERMOUNTAIN EXPRESS, CONSOLIDATED FREIGHTWAYS, GARRETT FREIGHT LINES, CALIFORNIA MOTOR EXPRESS, LTD., ALPHA BETA COMPANY (previously Alpha Beta Acme Markets, Inc.), CALIFORNIA TRUCKING ASSOCIATION, TRUCKING EMPLOYERS, INC., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, IBT LOCALS 287, 70, 468, 315, WESTERN CONFERENCE OF TEAMSTERS, JOINT COUNCIL OF TEAMSTERS NO. 7, NATIONAL OVER-THE-ROAD AND CITY CARTAGE POLICY AND NEGOTIATING COMMITTEE OF THE IBT, LOCAL 1546 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on April 30, 1976, as made final upon denial of petition for rehearing on June 21, 1976.

OPINIONS BELOW

The opinion for the Ninth Circuit is reported at ___ F.2d ___ and is set out in the Appendix, infra, pp. 4a-11a. The denial of petition for rehearing, ___ F.2d ___, is set out in the Appendix, infra, pp. 12a-13a. The Order of the District Court for the Northern District of California is reported at ___ F. Supp. ___, and is set out in the Appendix, infra, pp. 1a-3a.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 30, 1976, and was made final by that Court's denial of petition for rehearing entered on June 21, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioners submitted uncontroverted evidence of the statistical absence of blacks among over-the-road drivers, replacement of worksharing with a layoff policy when the first black was hired into an over-the-road position in 1968, and defendant Pacific Intermountain Express's (i) rejection of qualified black applicants on the ground that work

was not available while, in fact, white applicants were being hired, (ii) refusal to permit qualified black job seekers to submit applications, and (iii) deterrence of qualified applicants through a discriminatory reputation resulting directly from the above practices and policies.

In these circumstances,

1. Did the Court of Appeals err in holding only those petitioners who actually submitted applications for employment are eligible for seniority relief?

2. Did the Court of Appeals err in holding seniority relief may only run from the date an application for employment is submitted?

3. Did the Court of Appeals err in holding Title VII plaintiffs must prove intentional discrimination by defendants in order to be granted seniority relief?

4. Did the Court of Appeals err in affirming the district court's denial of petitioners' motion for preliminary injunctive relief, where the district court's judgment was based solely on an erroneous view of the law, and the Court of Appeals neither provided guidance to the district court on the proper exercise of its discretion nor carefully articulated why relief should not here be granted?

STATUTORY PROVISIONS INVOLVED

The right to contract, and the remedy, provisions of Sections 1 and 3 of the Civil Rights Act of 1866, which provisions are codified as 42 U.S.C. §§ 1981 and 1988 (1970).

The prohibition of discrimination by employers (in Section 703(a)), and the remedy provision (in Section 706(g)), of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(a) and 2000e-5(g) (1972 Supp.).

These provisions are set out in the Appendix, infra, pp. 14a, et seq.

STATEMENT OF THE FACTS

Petitioners instituted this action in December 1973, seeking relief from employment discrimination on the part of Pacific Intermountain Express (P.I.E.), other trucking industry employers, the International Brotherhood of Teamsters (I.B.T.), Western Conference of Teamsters, and its local affiliates. Their claims were based upon: (1) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e - 2000e-17 (1970),1/ (2) Section 1 of the Civil Rights Act of

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1/ In furtherance of the Title VII claim, petitioners had previously resorted to the California Fair Employment Practices Commission and the United States Equal Employment Opportunity Commission, as required by Section 706 of the 1964 Act, 42 U.S.C. § 2000e-5 (1970).

1866, 42 U.S.C. § 1981 (1970), and (3) Sections 1 and 301 of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151 and 185 (1970). The district court's jurisdiction rested upon 28 U.S.C. §§ 1331, 1343 and 2201, and 42 U.S.C. § 2000e-5.

Until 1968, when defendant P.I.E. first hired a black as an over-the-road driver, the road drivers were not laid off during a decline in business, but rather the drivers shared the available work. However, with the advent of black over-the-road drivers, this policy was abandoned. Affidavit of Thomas L. Murray. 2/

In November and December of 1974, defendant P.I.E. laid off all of its six black over-the-road drivers who had been employed at its Emeryville (California), Los Angeles, and Albuquerque terminals. All but one had been previously rejected and refused the opportunity to apply and all had been deterred from applying for employment with P.I.E. prior to the filing of the complaint in this lawsuit, though they were then qualified, available for work, and residing in the relevant labor markets. Affidavits of Leon Jones, Gene

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2/ Affidavits and other evidence relied upon herein were submitted to the district court and transmitted to the Court of Appeals as evidence in this action. They will be provided to this Court pursuant to Rule 21, Rules of the U.S. Supreme Court.

Gathright, Robert Lattimore, Charles Phillips, Clellan Moore, and Richard H. Stinson, and Charge of Discrimination of George Turks. Most were hired after this action was commenced and all performed their work satisfactorily. They were laid off according to their date-of-hire seniority, in accordance with the last-hired-first-fired principle incorporated into the collective bargaining agreement between P.I.E. and defendant Teamsters Unions. See National Master Freight Agreement; Western States Area Motor Freight Agreement.

In January 1975, petitioners moved the district court for preliminary injunctive relief, praying for reinstatement of the laid off blacks and sharing of available work among incumbent all white work force and petitioners, and seniority equal to what would have been possessed by blacks but for P.I.E.'s discriminatory conduct. Petitioners presented uncontradicted evidence of P.I.E.'s discrimination, including statistical evidence of the complete absence of minorities from among the hundreds of over-the-road drivers employed by P.I.E. and affidavits of petitioners, to show that P.I.E.: (1) repeatedly rejected petitioners' applications while white applicants were being hired (Affidavits of Clellan Moore, Charles Phillips, Robert Lattimore, and Richard H. Stinson); (2) repeatedly refused to permit petitioners to submit formal applications (Charge of George Turks, Affidavits of Charles Phillips, Clellan Moore, Richard

H. Stinson) from as early as 1961 (Charge of George Turks) until as late as 1971, 1972 and 1973 (Affidavits of Charles Phillips and Clellan Moore); (3) maintained segregated working conditions under which whites were permitted to refuse to drive with blacks (Affidavits of Leon Jones and Gene Gathright); and (4) by such conduct and the absence of blacks among defendant's over-the-road drivers, discriminatorily deterred petitioners from applying for employment. Affidavits of Leon Jones, Gene Gathright, Robert Lattimore, Charles Phillips, Clellan Moore, Richard H. Stinson, and Charge of George Turks.

On April 1, 1975, the district court denied petitioners' motion for preliminary injunctive relief. Appendix, infra, p. 3a.

The district court relied upon Franks v. Bowman Transportation Company, 495 F.2d 398 (1974), subsequently reversed in this Court, ___ U.S. ___, 96 S. Ct. 1251 (1976), in which the Fifth Circuit held that under 42 U.S.C. § 2000e-2(h), there was no violation of Title VII where the seniority system continued effects of a discriminatory hiring practice so as to deny rejected applicants seniority credit that they would

have possessed but for unlawful discrimination. 3/

Thus, the district court concluded:

> "Since PIE's seniority system and layoffs pursuant to it are valid, despite alleged past hiring discrimination, this Court must reject plaintiffs' proposal [of worksharing]." (Emphasis added.) Appendix, infra, p. 3a.

The district court provided no alternative ground for its granting petitioners no relief whatsoever. It did, however, comment that "even if the seniority system were valid," a remedy providing for seniority dated back to when petitioners would have applied for work but for P.I.E.'s discriminatory reputation must be rejected, as such a remedy

> "would be inconsistent with the requirement that one seeking to prove racial discrimination against him in hiring show he actually applied for the desired position [McDonnell Douglas Corp. v. Green,

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3/ The district court also cited Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309 (7th Cir. 1974), subsequently denied certiorari, ___ U.S. ___, 44 U.S.L.W. 3663 (1976), and EEOC v. Jersey Central Power and Light Co., 508 F.2d 687 (3d Cir. 1975), subsequently vacated, ___ U.S. ___, 44 U.S.L.W. 3663 (1976).

411 U.S. 792, 802 (1973)]." (Citation by the court.) Appendix, infra, p. 3a.

On appeal, petitioners painstakingly reviewed the nature and evidence of P.I.E.'s discrimination against them, discussed supra. Defendants, in their brief, relied on the law as it had been construed in the district court.

On April 30, 1976, the Court of Appeals affirmed the district court's denial of petitioners' motion for preliminary injunctive relief. Appendix, infra, p. 5a.

Though the district court had rendered its decision solely as a matter of law (see Opinion of the District Court, Appendix, infra, p. 1a, and discussion, supra), the Court of Appeals held its own review of that decision to be limited to only two areas of inquiry:

> "(1) Will irreparable harm result absent a stay? (2) Is there a likelihood that the moving party will prevail on the merits?" Id., Appendix, p. 6a.

The Court of Appeals did note that, in light of this Court's decision in Franks, supra, continued reliance on the Fifth Circuit's opinion would be "error." However, the Court of Appeals construed Franks to hold that

> "possible relief . . . (1) would date back only to the time the plaintiffs submitted

> their applications for employment to employer defendants, (2) would be against only those employers who had then intentionally engaged in discriminatory, and hence unlawful, employment practices, and (3) would apply only to the benefit of presently qualified OTR drivers." Appendix, infra, pp. 7a, 8a.

Further, the Court of Appeals held that there is insufficient evidence in the record to show a "strong likelihood" of petitioners' succeeding on the merits, Appendix, infra, p. 8a, though petitioners' affidavits showing rejected applications, refusals to allow applications and deterrence from application were never rebutted by P.I.E., nor was this evidence ever addressed by the district court, which determined the issue upon an erroneous interpretation of the law.

On June 21, 1976, the Court of Appeals denied petitioners' request for rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Erred in Holding That Only Those Who Submit Applications for Employment Are Eligible for Relief Under Title VII.

This Court, in Franks v. Bowman Transportation Co., ___ U.S. ___, 96 S. Ct. 1251 (1976), held that "seniority relief for identifiable victims of illegal hiring discrimination is a form of relief generally appropriate under Sec. 706(g) [of the Civil Rights Act of 1964]." Id. at ____, 96 S. Ct. at 1271.

The Court of Appeals, in holding that seniority relief is only available to those who have filed applications for employment, Appendix, infra, pp. 7a, 8a, misapplies this Court's mandate in Franks, so as to provide relief to "identifiable victims" only if these victims have actually submitted applications.

This holding conflicts with the positions taken by the Second, Fifth, Eighth and Tenth Circuits. 4/ In

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4/ The court's holding appears as well to conflict with a prior holding in the Ninth Circuit, United States v. Int'l Ass'n of Ironworkers, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971), where seniority relief was made available by the district court to blacks who had not submitted applications, though the question was not directly addressed by the Court of Appeals in affirming the decision of the lower court.

Acha v. Beame, 531 F.2d 648 (1976), the Second Circuit held a Title VII plaintiff claiming discrimination in hiring might:

> "satisfy her burden by demonstrating that she actually filed an application for employment or wrote a letter complaining about the hiring policy early enough during the period of discrimination, or offer proof that she had expressed a desire to enlist in the police force but was deterred by the discriminatory practice barring females." (Emphasis added.) Id. at 656.

See also, United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir. 1972), cert. denied, 412 U.S. 939 (1973); EEOC v. Local 638 . . . of the Sheetmetal Workers, 532 F.2d 821, 832 (2d Cir. 1976).

And in United States v. Sheetmetal Workers Local 36, 416 F.2d 123 (1969), the Eighth Circuit granted seniority in the Union hiring hall to black community residents likely to have been deterred from earlier belonging to the Union. "In the light of [community members' awareness of the Union's discriminatory policies], it is unreasonable to expect that any Negro tradesman working for a Negro contractor or a non-construction white employer would seek to use the [hiring hall or join the Union]." Id. at 132.

Notably in these cases the Second and Eighth Circuits provide eligibility for relief to a broad, unidentified

plaintiff class and, indeed, in Sheet-metal Workers, supra, the Eighth Circuit noted the lack of certainty to the plaintiff class to which it was providing relief, but determined such certain evidence was unnecessary. Id. at 132. Here, in sharp contrast, the Court of Appeals would deny eligibility to petitioners who are certain in number, and who have already set forth clear uncontroverted evidence, reviewed, supra, of their qualification and availability for employment, and of P.I.E.'s refusing to permit them to submit applications and deterring their application through years of specific proven acts of discriminatory abuse. 5/

The Court of Appeals' adoption of such a restrictive standard for eligibility mirrors the district court's reliance on McDonnell Douglas v. Green, 411 U.S. 792 (1973), Appendix, infra, p. 3a, for such a position. Though in McDonnell Douglas this Court did note that a prima facie case of discrimination may be made by showing, inter alia,

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5/ See, for instance, the Charge of George Turks, who was refused permission to even apply in 1961. Thereafter he did not again apply at P.I.E. for many years. And see the Affidavit of Richard H. Stinson, who was refused an interview with P.I.E. in 1965. Thereafter he did not apply again until 1967. Here, where deterrees claim they knew P.I.E. did not hire blacks, they had substantial experience upon which to base their claim.

that application for employment had been made, id. at 802, it specifically noted that a case otherwise may be made in other factual circumstances. Id. at 802, n.13.

The Fifth and Tenth Circuits have considered and rejected the improper interpretation of McDonnell Douglas that the Court of Appeals appears here to adopt. See Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 55 (5th Cir. 1974), review granted ____ U.S. ____, 44 U.S.L.W. 3662 (1976); Rich v. Martin Marietta, 522 F.2d 333, 346-47 (10th Cir. 1975).

The approach of the Second, Fifth, Eighth and Tenth Circuits, supra, in contrast to that of the Court of Appeals here, adheres more faithfully to the mandate of this Court in Franks, supra, and to its duty "to render a decree which will so far as possible eliminate the discrimination in the future." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975), quoting Louisiana v. United States, 380 U.S. 145, 154 (1965).

II. The Court of Appeals Erred in Holding Seniority Relief Under Title VII May Only Run from the Date of Submission of an Application for Employment.

The Court of Appeals' holding that "possible relief . . . (1) would date back only to the time the plaintiffs submitted their applications for employment to employer defendants," Appendix, infra, pp. 7a-8a, 6/ directly conflicts

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6/ Notably, the Court of Appeals interposed a comment in its Opinion, Appendix, infra, p. 8a, indicating its concern with the actual availability of positions during the contested period. It is more than arguable that it is the court's intent to limit further the date from which seniority runs, i.e., from vacancy rather than application.

On this point, the court's position is in conflict with that of the Fifth and Eighth Circuits. See Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (1969), cert. denied, 397 U.S. 919 (1970); United States v. Sheetmetal Workers, Local 36, 416 F.2d 123 (8th Cir. 1969).

Moreover, petitioners in their affidavits, supra, have frequently noted the hiring of white employees while their applications were either not accepted or they were deterred from applying.

with the Second Circuit's holding in Acha, supra, that seniority remedially granted may run from the date upon which a claimant may show she was deterred from applying for employment.

The court's position also stands in conflict with that generally taken by the Fifth Circuit regarding the date used for calculating carryover seniority to remedy discrimination in the trucking industry. See United States v. T.I.M.E.--D.C., Inc., 517 F.2d 299, 318 (1975), review granted ____ U.S. ____, 44 U.S.L.W. 3661 (1976); Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 63-64 (1974), review granted ____ U.S. ____, 44 U.S.L.W. 3662 (1976); Bing v. Roadway Express, 485 F.2d 441, 451 (1973). In these cases that court has consistently held seniority should run from the date at which local drivers were qualified to drive over-the-road. 7/

Finally, the position of the Court of Appeals is inconsistent with the approach generally followed in the departmental seniority cases. See, e.g., Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); United States v. Sheetmetal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

7/ Petitioners here have submitted uncontroverted evidence of their experience and ability to drive over-the-road for many years prior to their eventual employment at P.I.E. And their satisfactory employment with the company and attempts to apply earlier stands as evidence of their interest in the jobs.

III. The Court of Appeals Erred in Holding P.I.E.'s Discriminatory Conduct Need Be Intentional in Order for Relief To Be Granted.

It is well settled that a plaintiff need not prove an intent to discriminate on the part of an employer in order to seek relief under Title VII. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). See, also, Albemarle Paper Co. v. Moody, 422 U.S. 405, 422-23 (1975); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 995-97 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970).

Notwithstanding the unambiguous holdings of this Court in Griggs and Albemarle Paper Co., the Court of Appeals here holds petitioners may be granted:

> "possible relief . . . against only those employers who had then intentionally engaged in discriminatory, and hence unlawful, employment practices . . . .
>
> . . . .
>
> [The court concluded] the matter should be remanded to the district court for trial. If the intentional discrimination against the plaintiffs is established . . . the court will [fashion appropriate relief]." (Emphasis added.) Appendix, infra, pp. 7a-9a.

The Court of Appeals is plainly in error and in conflict with this Court's holdings.

IV. The Court of Appeals Erred in Affirming the District Court's Denial of Petitioners' Motion for Preliminary Relief, Where the District Court's Judgment Was Based Solely on an Erroneous View of the Law, and the Court of Appeals Neither Provided Guidance to the District Court on the Proper Exercise of Its Discretion, Nor Carefully Articulated Why Relief Should Not Here Be Granted.

This Court, in Franks v. Bowman Transportation Co., ___ U.S. ___, 96 S. Ct. 1251 (1976), provided that a court's discretion denying relief under Title VII may not be exercised arbitrarily, but only upon sound legal principles, and in keeping with its duty to effect the objectives of Title VII. Id. at ____, 96 S. Ct. 1267. See also, Albemarle Paper Co. v. Moody, 422 U.S. 405, 416, 421 (1974).

However, the district court in this action denied petitioners' motion for relief, not in the sound exercise of its discretion, but solely in reliance upon an erroneous view of the law. See Statement of the Facts, supra.

Notwithstanding the absence of discretionary action on the part of the district court, and the district court's clearly erroneous view of the law, the Court of Appeals somehow managed to conclude the district court did not abuse its discretion, and affirmed the denial of petitioners' motion for preliminary injunctive relief. The court

thereby breached its duty to provide firm guidance to the district court in the exercise of its discretion so as to provide for effectuation of the objectives of Title VII as is required under Franks v. Bowman Transportation Co. and Albemarle Paper Co. v. Moody, supra.

Nor did the Court of Appeals independently address the exhaustive evidence submitted by petitioners (see affidavits, discussed supra), so as to justify the affirmance of the district court judgment. In the face of petitioners' detailed review of this evidence, the Court of Appeals' conclusory comment--that "the necessary evidence is not in the record before us"--is scarcely an adequate explanation of its judgment. Where claimants have suffered continuous discrimination and personal abuse for many years (see affidavits, supra) and are suffering economic impoverishment as a result, and claimants petition the courts for relief, this Court's holdings demand that the court which denies such relief "carefully articulate its reasons for so doing" and provide careful guidance as well. Franks v. Bowman Transportation Co., supra, ___ U.S. at _____, 96 S. Ct. at 1269, citing Albemarle Paper Co. v. Moody, 422 U.S. at 421 n. 14. The Court Court of Appeals' scant consideration of petitioners' claim and refusal to provide the required guidance violate the letter and spirit of this Court's judgments in Franks and in Albemarle Paper, and is in error.

CONCLUSION

For the reasons stated, the Writ of Certiorari should be granted.

Respectfully submitted,

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September 14, 1976

Attorneys for Petitioners gratefully acknowledge the assistance of Simon Klevansky, Stanford Law School, '77, in the preparation of this Petition.

APPENDIX

ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF
CALIFORNIA

LEON JONES, et al.,

PLAINTIFFS,

- v. -

PACIFIC INTERMOUNTAIN EXPRESS,
et al.,

DEFENDANTS.

CIV. A. NO. C-73-2296 RHS

APRIL 1, 1976

ORDER

SCHNACKE, District Judge.

Plaintiffs allege employment discrimination and seek a preliminary injunction.

The collective bargaining agreement between defendant Pacific Intermountain Express (PIE) and defendant locals of the International Brotherhood of Teamsters, requires lay-offs in inverse order of seniority--the "last hired, first fired" system. Five black over-the-road truck drivers at PIE's Emeryville, Los Angeles, and Albuquerque terminals (Jones, Turks, Moore, Lattimore, Phillips) were laid off because of low seniority, and one, Gathright, is threatened with layoff. They argue that they have low seniority because, due to racial discrimination, they were not hired until relatively recently. Thus, plaintiffs argue, "last hired, first fired" is itself illegal under Title VII of the 1964 Civil Rights Act, justifying a preliminary injunction to get these drivers back to work. They rely upon Watkins v. United Steel Workers of America, Loc. No. 2369, 369 F.Supp. 1221, 1228 (E.D. La. 1974). But that case was decided before Franks v. Bowman Transportation Co., 495 F.2d 398, 417-418 (1974), was decided by the Court of Appeals for the Fifth Circuit, whose rulings are binding on the Watkins Court. In Franks constructive seniority back to the date of application was sought for black applicants for over-the-road truck driving jobs who applied before 1972, but were rejected because of race. But the Court held that this discrimination did not make illegal an otherwise bona fide seniority system. [42 U.S.C. §2000e-2(h)]. The Seventh Circuit [Waters v. Wisconsin Steel Works of Int. Harvester Co.,

502 F.2d 1309 (1974)] and the Third Circuit [Jersey Central Power & Light Co. v. IBEW Local 327, 508 F.2d 687 (1975)], have subsequently reached similar conclusions.

Since PIE's seniority system and layoffs pursuant to it are valid, despite alleged past hiring discrimination, this Court must reject plaintiffs' proposal (which appears contrary to Article 43, §2(a), of defendants' Western States Area Over-the-Road Motor Freight Supplemental Agreement), that those black drivers laid off be reinstated and the available PIE work be shared equally among all drivers. And even if the seniority system were invalid, this Court would reject plaintiffs' proposal that seniority of PIE's black drivers, laid off or otherwise, be dated back to when they would have applied for work at PIE, but for its alleged reputation for racial discrimination. This remedy would be inconsistent with the requirement that one seeking to prove racial discrimination against him in hiring show he actually applied for the desired position [McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)].

The motion for a preliminary injunction is denied.

Dated: April 1, 1975

/s/Robert H, Schnacke
Robert H. Schnacke
United States District Judge

OPINION OF UNITED STATES
COURT OF APPEALS FOR THE
NINTH CIRCUIT

LEON JONES, et al.,

PLAINTIFFS-APPELLANTS,

- v. -

PACIFIC INTERMOUNTAIN EXPRESS,

et al.,

DEFENDANTS-APPELLEES.

NO. 75-2049

FILED APRIL 30, 1976

BARNES and TRASK, Circuit Judges, and
LUCAS,* District Judge.

BARNES, Senior Circuit Judge:

This is an appeal from a denial of a motion for preliminary injunction. Our jurisdiction rests solely on 28 U.S.C. §1292(a)(1), which allows appeals from interlocutory orders denying injunctive relief.

We affirm.

As has been said by this Court on many occasions, and reiterated as recently as March, 1976:

> "the district court's denial of a preliminary injunction is subject to a particularly narrow scope of review in this court. 'The grant or denial of a preliminary injunction is subject to reversal only if the lower court based its decision upon an erroneous legal premise or abused its discretion.' William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 562 F.2d 86, 88 (9th Cir. 1975), citing Douglas v. Beneficial Finance Co., 469 F.2d 453, 454 (9th Cir. 1972), and Burton v. Matanuska Valley Lines, 244 F.2d 647, 651 (9th Cir. 1957). Thus we are bound by the district court's resolution of conflicting evidence and other findings of fact. If the court applied the proper legal standard, we cannot reverse its decision unless denial of the

*Honorable Malcolm M. Lucas, United States District Judge, Central District of California, sitting by designation.

injunction was so unjustified as to constitute an abuse of discretion."

Federal Trade Commission v. Simeon Management Corporation, ___F.2d ___, No. 75-2363 (9th Cir. 1976). The granting or withholding of a preliminary injunction rests in the sound discretion of the trial court,[1] and among other factors to be considered are whether irreparable harm will result absent such stay, and whether there is a likelihood that the moving party will prevail on the merits.[2]

This appeal rests as to jurisdiction upon one of the five exceptions listed in 28 U.S.C. §1292, allowing an appeal without the usual requirement of finality in the trial court's action. These exceptions have been carved out by the Congress to "permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence."[3]

Thus but two areas of inquiry are open to a reviewing court in this type of appeal:

(1) Will irreparable harm result absent a stay?

(2) Is there a likelihood that the moving party will prevail on the merits?[4]

While the complaint in this employment discrimination action is not before us on this appeal in haec verba, appellants assert in their motion (in conclusionary language only)[5] that they have satisfactorily answered in the affirmative both questions asked above.

We note this action is one of the many cases presently before the courts on "The Problem of Last Hired, First Fired: Retroactive Seniority as a Remedy under Title VII."[6]

The trial court pointed out in its opinion that the collective bargaining agreement between defendant employer Pacific Intermountain Express and defendant locals of the International Brotherhood of Teamsters required layoffs of over-the-road truck drivers

("OTR drivers") in inverse order of their seniority, and that while plaintiffs rely upon Watkins v. United States Steel Workers of America, Loc. No. 2369, 369 F. Supp. 1221, 1228 (E.D. La. 1974) (a district court case in the Fifth Circuit), that same Circuit in Franks v. Bowman Transportation Co., Inc.,[7] a later appellate case, held that "constructive seniority back to the date of application, sought for black applicants for over-the-road truck driving jobs" who were "rejected because of race . . . did not make illegal an otherwise bona fide seniority system. 42 U.S.C. 2000e-2(h)." The district court also cited two Third Circuit cases which "subsequently reached similar conclusions."[8] Clearly the denial was justified under the law existing on April 2, 1975.

Franks v. Bowman Transportation Co., supra, was decided by the Supreme Court on March 24, 1976. ___ U.S. ___, 44 U.S.L.W. 4356. We note first that Bowman was a certified class action.[9] The case before us is not. Bowman dealt with the issues after a full trial. There has been no trial in this case. But Bowman held that both the district court's and the Court of Appeals' ruling that seniority relief was barred to certain plaintiffs (Class 3) by §703(h) of Title VII, 42 U.S.C. 2000e-2(h) was "clearly error." This statute was one basis relied upon by the district court as a ground for its denial of a motion for preliminary injunction. We cannot rely on it on this appeal, for in light of the Supreme Court opinion in Bowman, it would be error to do so.

It is also true that Bowman establishes there is a stronger likelihood that plaintiffs would prevail on the merits than has heretofore existed, though not as to all matters sought by plaintiffs below--but in a more limited way, and by way of relief under Title VII, §706(g). Such possible relief (unlike that demanded by plaintiffs below in their

motion), (1) would date back only to the time the plaintiffs submitted their applications for employment to employer defendants, (2) would be against only those employers who had then intentionally engaged in discriminatory, and hence unlawful, employment practices, and (3) would apply only to the benefit of presently qualified OTR drivers.

Appellants in their presentation below and on this appeal easily avoid any question of the then availability of jobs for either blacks or whites, when they assert the appellants here are entitled to have a seniority recognized, not back to the date when they first applied for their jobs, but back to the "fictional date"--the date they thought of applying, but failed to do so. There has been no consideration or determination here by the district court to establish that at any specific previous date any truck driving jobs were then available to anyone.

Brown, supra, does not hold that "an award of seniority status is a requisite in all circumstances." 43 U.S.L.W. 4363. The remedy under § 706(g) authorizes the court to "enjoin the unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . . . or any other equitable relief as the court deems appropriate . . . 42 U.S.C. §2000e-5(g)." Franks v. Bowman, supra, 44 U.S.L.W. 4360 n. 19 (emphasis added). See also 4361 n. 21 and 4363, Part IV.

Thus, as we have stated, while there is now a slightly stronger likelihood that plaintiffs may prevail on the merits of the case, there is certainly no strong likelihood of such success, nor is it "extremely likely" as appellants assert,[10] primarily because the necessary evidence is not in the record before us--just as it was not before the district judge when he

denied the motion, which is the subject of this appeal.

We conclude the matter should be remanded to the district court for trial. If the intentional discrimination against the plaintiffs is established by competent, substantial evidence at such trial, the court will undoubtedly fashion what it deems to be proper, adequate and equitable relief. At this point, having examined the record before us, we cannot conclude the district court abused its discretion in denying plaintiff's application for a preliminary injunction. Accordingly, the denial of the motion for preliminary injunction is affirmed, and the matter is remanded to the district court for further proceedings.

FOOTNOTES:

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[1] Meccano, Ltd. v. John Wanamaker, 253 U.S. 136, 141 (1920).

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[2] County of Santa Barbara v. Hickel, 426 F.2d 164, 168 (9th Cir. 1970); King v. Saddleback Junior College District, 425 F.2d 426, 427 (9th Cir. 1970), cert. denied, 404 U.S. 979 (1971); Jones v. Board of Regents, 397 F.2d 259 (9th Cir. 1968); The Quechan Tribe of Indians v. Rowe, ___ F.2d ___, No. 72-3199 (9th Cir. 1976); Sellers v. Regents of the University of California, 432 F.2d 493, 497 (9th Cir. 1970), cert. denied, 401 U.S. 981 (1971).

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[3] Wright on Federal Courts, Second Ed. (1973) p. 459.

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[4] German v. Times Mirror Co., 520 F.2d 786 (9th Cir. 1975); Friends of the Earth v. Coleman, 518 F.2d 373, 377 (9th Cir. 1975); Robinswood Community Club v. Volpe, 506 F.2d 1366, 1368 (9th Cir. 1974); Associated Students v. NCAA, 493 F.2d 1252, 1257 (9th Cir. 1974).

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[5] C.T. p. 4, ll. 7-9: "Plaintiffs allege that the law and facts in the instant case make it extremely likely that plaintiffs will prevail on the merits."

C.T. p. 4, ll. 10-14: "If this preliminary injunction is granted, the injury, if any, to the defendants herein, if the final judgment is in their favor, will be minimal compared to the injury plaintiffs will continue to suffer if this preliminary injunction is denied."

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[6] Title of an interesting note in 9 Georgia Law Review, 611 (1975). See also, "Last Hired, First Fired, Seniority, Layoffs & Title VII: Questions of Liability and Remedy," 11 Colum. J.L. & Soc. Prob. 343, 376, 378 (1975).

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[7] 495 F.2d 398, 417-418 (5th Cir. 1974) See also, United States v. Navajo Freight Lines, Inc., et al., 525 F.2d 1318 (9th Cir. 1975).

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[8] Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309, 43 U.S.L.W. 2110, cert. filed, 44 U.S.L.W. 3037 (July 22, 1975); Jersey Central Power & Light v. I.B.E.W. Local 327, 508 F.2d 687 (3rd Cir. 1975), cert. filed, 44 U.S.L.W. 3084 (Aug. 1, 1975); 44 U.S.L.W. 3207 (Sept. 24, 1975).

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[9] See C.T., pp. 87 and 88.

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[10] See note 5, supra.

ORDER OF UNITED STATES
COURT OF APPEALS FOR THE
NINTH CIRCUIT

LEON JONES, et al., etc.

PLAINTIFFS-APPELLANTS,

- v. -

PACIFIC INTERMOUNTAIN EXPRESS,
et al.,

DEFENDANTS-APPELLEES.

NO. 75-2049

FILED JUNE 21, 1976

BARNES and TRASK, Circuit Judges, and
LUCAS, District Judge.*

The panel as constituted in the above case has voted to deny the petition for rehearing, and to reject the suggestion for a rehearing en banc.

The full Court has been advised of the suggestion for an en banc hearing, and no judge of the Court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*Honorable Malcolm M. Lucas, United States District Judge, Central District of California, sitting by designation.

CIVIL RIGHTS ACT OF 1866

42 U.S.C. Section 1981:

Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. Section 1988:

Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provision of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the

trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Title VII, Civil Rights Act of 1964

Sec. 703(a); 42 U.S.C. Sec. 2000e-2a:

Unlawful employment practices--
Employer practices

(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Sec. 706(g); 42 U.S.C. Sec. 2000e-5(g):

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring

of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-400

LEON JONES, et al.,
Petitioners,

vs.

PACIFIC INTERMOUNTAIN EXPRESS, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PACIFIC INTERMOUNTAIN EXPRESS IN OPPOSITION

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November 8, 1976.

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In the Supreme Court
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BRIEF FOR PACIFIC INTERMOUNTAIN EXPRESS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.[1] 4a-11a) is reported at 536 F.2d 817 (9th Cir. 1976). The order of the district court (Pet. App. 1a-3a) is

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[1] "Pet. App." refers to the appendix bound with the petition; "Pet." references are to the petition for a writ of certiorari; "R." references are to the record in the court below.

reported at ..... F.Supp. ....., 10 FEP Cases 913 (1975).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 30, 1976. A petition for rehearing was denied on June 21, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the circuit court abused its discretion in affirming the district court's denial of plaintiffs' motion for a preliminary injunction, where granting the injunction would require respondent Pacific Intermountain Express (hereinafter referred to as "PIE" or "the company") to reinstate certain minority driver employees who were laid off in accordance with the provisions of a "last hired, first fired" contractual seniority system which, it is alleged, perpetuates hiring discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e, *et seq.*) and the Civil Rights Act of 1866 (42 U.S.C. §1981).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e, *et seq.*) and the Civil Rights Act of 1866 (42 U.S.C. §1981).

STATEMENT OF THE CASE

A. The Decisions Below:

On December 20, 1973, petitioners filed a complaint in the U. S. District Court for the Northern District of California alleging that respondents, including PIE, had discriminated and continued to discriminate against petitioners on the basis of race in violation of the Civil Rights Acts of 1964 and 1866[2] (R. 198). Immediately thereafter petitioners sought a temporary restraining order, which was denied by the district judge.

Petitioners did not seek further interim relief until more than one year later, when they filed a motion for a preliminary injunction on January 24, 1975 (R. 1-5). The court denied the motion on April 1, finding that the "last hired, first fired" seniority system which PIE utilized pursuant to its collective bargaining agreement with the Teamsters Union did not violate the Civil Rights Acts (R. 193).

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit. The court affirmed the order of the district court, and on June 21, 1976 denied a petition for rehearing (Pet. App. 4a-9a, 12a, 13a). The instant petition was filed on September 17, 1976.

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[2]The complaint contains class action allegations, but as of this date petitioners have not moved for class certification.

B. The Employment Senority System:

In accordance with its collective bargaining agreement, PIE maintains a chronological list of all regular drivers at each terminal, based on hiring dates. When the work force is reduced, employees are laid off in ascending order from the bottom of the list (R. 35). Employees retain recall rights for three years, and are rehired in inverse order of layoff (R. 36). The company must recall employees on layoff before hiring new employees.

PIE and the Teamsters Union have utilized this seniority system since the 1940's (R. 92). When this suit was filed, there were 96 employees on the seniority list at PIE's Emeryville, California terminal who were subject to the company's collective bargaining agreement with Teamsters Local 468. Twenty had been laid off due to lack of work (R. 92).

C. Reorganization of PIE:

In 1969 PIE began building several new terminals so that it could switch from the inefficient use of pairs of drivers for long over-the-road trips to a relay system utilizing single drivers for divisional runs of moderate distances (R. 168, 177). As a result, drivers from Los Angeles, Emeryville and Chicago were transferred to new facilities in places such as Albuquerque, New Mexico (R. 168). Those drivers who refused to redomicile were laid off according to the seniority list. During the period of reorganization, from 1969 to 1972, PIE had reemployment commitments to a substantial number of drivers who had refused to relocate (R. 177, 187). At some

locations, such as the Albuquerque terminal, new drivers were not hired until 1972.

D. Persons Alleging Discrimination:

Seven black persons submitted affidavits or declarations in support of the motion for preliminary injunction. Mr. Leon Jones was hired by the company when he first applied in 1968 (R. 31), Mr. George Turk was hired in 1973, the first time he applied after 1965, the effective date of Title VII (R. 38), and Messrs. Clellan Moore, Robert Lattimore and Charles Phillips were hired in 1972, 1974 and 1974, respectively, after PIE had met its reemployment commitments to drivers laid off during the reorganization of the company (R. 172, 174). All five were placed in appropriate positions on the seniority list immediately after they were hired. They were subsequently laid off in November and December, 1974, along with fifteen white drivers, in accordance with the seniority system (R. 92). Mr. Gene Gathright was still working for PIE when the motion for a preliminary injunction was filed (R. 47). Mr. Richard Stinson had rejected two offers of employment and had never been employed by PIE (R. 69, 171).

ARGUMENT

It is well established that the power of the Supreme Court to issue a writ of certiorari is discretionary and should be exercised only under special circumstances. *Durham v. United States,* 401 U.S.

481, 483 (1971).[3] When petitioners seek review of a non-final judgment on certiorari, such as in this case, the scope of review is even more restricted. The Court has not granted certiorari to review interlocutory orders, such as one denying a preliminary injunction, in the absence of an exceptional reason. *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1915); *American Construction Co. v. Jacksonville, Tampa and Key West Railway Co.*, 148 U.S. 372, 384 (1897).

The Court stated in *American Construction Co.*:

> ". . . [m]any orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this Court should not issue a writ of certiorari to review a decree of the circuit court of appeals or appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." 148 U.S. at 384.

In addition, the Court later held in *Hamilton-Brown Shoe Co:*

> "The decree sought to be reviewed [on certiorari] . . . was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application." 240 U.S. at 258.

[3] *Accord, State v. Swift & Co.*, 260 U.S. 146, 151 (1922); *City and County of Denver v. New York Trust Co.*, 299 U.S. 123, 133 (1913); *Hyde v. Shine*, 199 U.S. 62, 85 (1905). The Court also has held that however important an issue may be to the petitioner, certiorari will be denied if the question raised is not of sufficient gravity and general importance, or if there is no conflict between the decisions of federal and state courts, between circuit courts or with prior decisions of this Court. *Fields v. United States*, 205 U.S. 293 (1907); *Forsyth v. Hammond*, 166 U.S. 506, 514 (1897); *Lau Ow Bew v. United States*, 144 U.S. 47 (1892).

We show below that the petition for a writ of certiorari here fails to establish extraordinary circumstances requiring review of an interlocutory order.[4]

I

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

To obtain review of an interlocutory order petitioners must show that there is a significant question of federal law or conflict with another appellate court, and that there are extraordinary circumstances which require that the petition be granted. The instant petition does not advance any compelling reason or authority to support the grant of certiorari at this stage of the proceedings.

We have found only three cases in which the Court has granted certiorari to review a lower court's disposition of a motion for a preliminary injunction due to the existence of an important question on the merits.[5] However, none of the unique reasons which

[4] For example, the record does not explain the failure of plaintiffs to move for a preliminary injunction until nearly fourteen months after the filing of the complaint.

[5] A writ of certiorari was granted in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1951), to review a district court's grant of a preliminary injunction which restrained the Secretary of Commerce from enforcing an executive order of President Truman directing the seizure and operation of privately owned steel plants. The Court granted certiorari in *United States v. Republic Steel Corp.*, 362 U.S. 483 (1960), a case in which a court of appeals reversed a district court which had enjoined defendants from discharging industrial waste into a river, in violation of the Rivers and Harbors Act, 33 U.S.C. §403. In *United States v. First Nat'l. City Bank*, 379 U.S. 378 (1965), the Court granted certiorari to review a circuit court's reversal of an injunction granted by a district court to prevent the bank from transferring property to a foreign corporation which allegedly owed income tax to the Internal Revenue Service.

accounted for the Court's grant of certiorari in those cases exists here; there is no potential national emergency, danger of irreparable ecological harm, or possibility that money owed to the U.S. Government will be transferred beyond the jurisdiction of the courts of the United States.

Further, in those cases the actions were brought to protect public interests, as opposed to the private interests involved in this case. As the Court stated in *United States v. First National City Bank,* note 5, *supra,* "Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." 379 U.S. at 383. Accordingly, the Court has declined to grant certiorari where the issue involved was a matter of private interest and there had been no final judgment in the lower court. *Chicago & Northwestern Railway Co. v. Osborne,* 146 U.S. 354 (1892).

Consistent with this long practice, the Court traditionally has denied petitions for writs of certiorari to review decisions of courts of appeals in suits brought to obtain injunctive relief. In two of such cases, petitioners alleged discrimination against them on the basis of race, in violation of the Fourteenth Amendment to the United States Constitution.[6]

[6] *Nashville I-40 Steering Committee v. Ellington,* 387 F.2d 179 (6th Cir. 1967), *cert. denied,* 390 U.S. 921 (1968); *Bd. of Education v. Taylor,* 294 F.2d 36 (2d Cir. 1961), *cert. denied,* 368 U.S. 940 (1961). See, *Emery Airfreight Corp. v. Local Union 295,* 449 F.2d 586 (2d Cir. 1971); *cert. denied,* 405 U.S. 1056 (1972) (district court enjoined union from striking; court of appeals reversed); *Rutherford v. American Medical Ass'n,* 379 F.2d 641 (7th Cir. 1957), *cert. denied,* 389 U.S. 1043 (1968), *reh. denied* 390 U.S. 975 (1968) (district court dismissed action to enjoin Food and Drug Administration and American Medical Association from interfering with the distribution of a drug; court of appeals affirmed); *Stewart-Warner Corp. v. Westinghouse Electric Corp.,* 325 F.2d 822 (2d Cir. 1963), *cert. denied,* 376 U.S. 944 (1964) (district court dismissed action to enjoin patent infringement; court of appeals reversed); *Wolf Brothers & Co. v. Hamilton-Brown Shoe Co.,* 165 F. 413 (8th Cir. 1909), *cert. denied,* 214 U.S. 514 (1909) (circuit court dismissed action to enjoin trademark infringement; court of appeals reversed).

In sum, petitioners have failed to raise a federal question which even approaches in significance those presented in cases in which certiorari has been granted to review an interlocutory order. No reason has been presented for the Court to depart from its general policy of denying certiorari on interlocutory orders lacking a significant federal question and a compelling public interest.

II

THE DECISION BELOW IS CORRECT

The decision below was the only one possible for the court to make on the record before it. Thus, the court of appeals found that petitioners had not established a key element of their case, a strong likelihood of success on the merits, "primarily because the necessary evidence is not in the record before us—just as it was not before the district judge when he denied the motion [for a preliminary injunction]" (Pet. App. 8a-9a).

An examination of the affidavits and declarations filed in support of the motion for preliminary injunc-

tion reveals the "necessary evidence" which petitioners failed to adduce in their attempt to secure interim relief. Petitioners submitted statistical evidence in an attempt to support a *prima facie* case of discrimination, but the figures upon which they relied were incomplete and inconclusive. For example, the statistics submitted to the district court did not show how many drivers PIE had hired in recent years, and the percentage of minorities among that group. Instead, petitioners relied on the number of drivers employed at the time of the application for a temporary restraining order. Petitioners submitted to the court population figures for the State of California, partially broken down by county, but omitted any proof of the relevant geographical hiring area for drivers at any of PIE's terminals, and failed to demonstrate the relevance of population figures as opposed to civilian labor force statistics.

Accordingly, there was no evidence before the district court from which it could have concluded that petitioners had demonstrated a strong likelihood of proving discrimination by PIE. Moreover, even if petitioners had shown a discrepancy between the percentage of black employees hired in a given time period and the proportion of qualified black drivers in the relevant hiring area, that alone would not have necessarily established a *prima facie* case. In recent decisions courts have found such evidence standing alone is not conclusive proof of discrimination. See *Louis v. Pa. Development Authority*, 371 F.Supp. 877 (1974); *Harper v. Mayor & City Council*, ___ F.Supp.

___, 5 FEP Cases 1050 (1973); *Afro American Patrolmen's League v. Duck*, 366 F.Supp. 1095 (1973). Cf. *Pettway v. American Cast Iron Pipe Co.*, ___ F.Supp. ___, 7 FEP Cases 1010 (1972).

Finally, assuming *arguendo* that petitioners had established statistically a *prima facie* case of discrimination, the court below properly found that the injunctive relief sought would not be warranted on the record before it. As to this question, too, petitioners failed to meet their burden of proof. Thus, the court below correctly noted:

> "There has been no consideration or determination here by the district court to establish that at *any* specific previous date *any* truck driving jobs were then available to *anyone*." (Pet. App. 8a, emphasis in original text).[7]

Since petitioners failed to prove their entitlement to relief, the question of whether the seniority of alleged discriminatees should be retroactive to the date of application or the date they thought of applying or would have applied is moot.[8]

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[7]Petitioners also failed to establish the existence of irreparable injury. While petitioners asserted economic loss due to the allegedly discriminatory layoffs, such injuries have been held not "irreparable" in the absence of more extraordinary circumstances. *Sampson v. Murray*, 415 U.S. 61 (1974).

[8]For this reason, the Court need not consider the alleged conflict between the decision below and those of other circuits on the issue of retroactive seniority. Furthermore, no such conflict actually exists. The cases cited by petitioners deal with persons actually hired (*Acha v. Beame*, 531 F.2d 648 (2d Cir. 1976)); promotions or transfers (*Rich v. Martin Marietta Corp.*, 522 F.2d 333 (10th Cir. 1975); *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974), *cert. granted*, ___ U.S. ___, 44 U.S.L.W. 3662 (1976)); or union or apprentice committee discrimination in job referrals, issuances of work permits or admis-

In summary, the court of appeals' finding that petitioners failed to establish a strong likelihood of success on the merits does not warrant review by the Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted the petition for a writ of certiorari should be denied.

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF & TICHY,

By ROBERT M. LIEBER,

Counsel for Respondent

Pacific Intermountain Express.

November 8, 1976.

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sion to membership (*EEOC v. Local 638, Sheet Metal Workers,* 532 F.2d 821 (2d Cir. 1976); *United States v. Ironworkers Local 86,* 443 F.2d 544 (9th Cir. 1971); *United States v. Sheet Metal Workers Local 36,* 416 F.2d 123 (8th Cir. 1969); *United States v. Wood, Wire and Metal Lathers Local 46,* 471 F.2d 408 (2d Cir. 1973). The issue which petitioners claim was erroneously decided below has not been ruled upon in other circuits and was mere *dicta* in this case.